

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

AES KALAELOA VENTURE, LLC

Employer

and

Case 37-RC-4114

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1260,
AFL-CIO¹

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer, a Delaware limited liability corporation, owns and operates a bulk unloading facility located at 91-650

¹ The Petitioner's name is in accord with the parties' stipulation.

Malakole Road, Kapolei, Hawaii. During the twelve-month period preceding the hearing, the Employer derived gross revenues in excess of \$500,000 and purchased and received goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Hawaii. Based on such stipulated facts, I find that the Employer is engaged in commerce and that it will effectuate the policies of the Act to assert jurisdiction in this matter.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.²

5. The Petitioner seeks to represent a unit comprised of all full-time and regular part-time employees employed by the Employer at its Kalaeloa Harbor, Hawaii location; excluding all other employees, finance and accounting employees, confidential employees, office clerical employees, professional employees, administrative assistant to the plant manager, guards and/or watchpersons, managers, and supervisors as defined in the Act, as amended. The petitioned for unit consists of approximately five employees.

The only issue presented is whether John Keala must be excluded from the unit as a statutory supervisor. The Employer contends Keala should be excluded from the unit on this basis and the Petitioner takes a contrary view. For the reasons discussed below, I

² The parties stipulated that there is no contract bar to this proceeding.

find that the Employer has not carried its burden to establish that Keala is a statutory supervisor and I include him in the unit.

The only witness to testify at the hearing was Employer Vice President and Manager Patrick Murphy. Murphy is also Vice-President of AES Hawaii, Inc.

Facts. AES Hawaii, Inc., has operated a coal burning power plant at Kalaeloa Hawaii since about September 1992. The record reflects that the Employer was formed in about 2001 to provide ship loading and unloading services. In providing this service, the Employer has, since 2002, operated and maintained the continuous ship unloader (CSU) at the Kalaeloa Harbor facility. The CSU is a piece of unloading equipment used to dig out coal or sand from a ship and deposit it onto conveyor belts. The record reflects that the Employer was formed and purchased the CSU in about 2001. The Employer has operated and maintained the loading and unloading equipment at the Kalaeloa Harbor facility since 2002. Prior to that time, maintenance and operation of the CSU was subcontracted to another company.

The record reflects that in addition to the CSU, the Kalaeloa Harbor facility also has conveyor belts, a shop with offices, and a small tool maintenance/work area, a cement silo, compressors associated with the cement silo and a discharge hopper to discharge sand to trucks instead of the overlying conveyor when they are discharging coal for AES Hawaii. The Kalaeloa Harbor facility is located about two miles or a five minute drive from AES Hawaii's main plant

The CSU is used to discharge coal from ships for AES Hawaii about once a month. The coal is discharged from a ship through the CSU, loaded onto conveyor belts,

and ultimately deposited onto an overlaying conveyor which belongs to AES Hawaii.

About eight or nine times a month, the CSU is also used to discharge cement from the cement silo for Hawaiian Cement. The cement is loaded into the Employer's cement silo by employees of Hawaiian cement. The Employer then pneumatically conveys the cement from the silo onto interisland barges. The CSU is also used periodically to discharge sand from barges for Hawaii Cement.

There are five individuals who work at the Kalaeloa Harbor facility, including John Keala. Keala was employed by the Employer's predecessor. The job of these workers is to monitor the CSU's, hydraulic system and conveyor belts. They also perform minor repairs to the CSU when it is not in use. When sand is being unloaded, their work involves more manual labor because the abrasive nature of the sand causes bearing failures in the equipment.

The regular work schedule for the five employees at the Kalaeloa Harbor facility is Monday through Friday, from 7 a.m. to 3:30 p.m. This schedule has been in place since before the Employer acquired the operation. During regular work hours, the employees perform routine maintenance and sometimes emergency maintenance on the equipment. During ship unloading operations, they work 24 hours a day on alternate 12-hours-on and 12-hours-off shifts until the process is completed. When they handle cement barge loading for Hawaii Cement, they work on the schedule dictated by the needs of that company. Coal unloading typically takes place once a month for five and six days at a time.

There is no job description for Keala's position. Vice President Murphy, whose office is located at AES Hawaii's main plant, testified that Keala is the superintendent at the Kalaeloa Harbor facility and is responsible for running that operation. While Murphy testified generally that he relies on Keala to handle all personnel matters and Keala would report to Murphy if such matters arose, he also testified that he was unaware of any personnel matters arising at the facility.

Murphy testified that Keala independently handles the scheduling for the employees at the Kalaeloa Harbor facility, however, he also testified that he had no knowledge of how scheduling decisions were made and that he had no role in the process. According to Murphy, the regular Monday through Friday, 7 a.m. to 3:30 p.m. schedule has been in existence since before the Employer took over the operation. According to Murphy, Keala is responsible for scheduling the 12-hour shifts and other work that arises unexpectedly. For example, Murphy testified that he had recently received a phone call from a company asking if the Employer could handle its cargo of coal when its ship unloading equipment broke down on Maui. Murphy called Keala and asked him to make the necessary arrangements and Keala handled the scheduling for the unloading work.

According to Murphy, his role in the Kalaeloa Harbor operation is "minimal," and he does not tell Keala how to run the operation. Murphy testified that Keala "runs the show;" that he has been with the business for a long time, understands it and is a good leader. Murphy testified that he visits employees at the harbor once or twice a week and more often when a coal or sand shipment is being unloaded. According to Murphy, his

primary responsibility is to “preach safety” to employees and to ensure that they are adhering to the Employer’s safety practices. Murphy testified that Keala is the supervisor and he (Murphy) relies on Keala’s experience and ability.

Murphy testified that Keala cannot hire or fire employees independently and that he (Murphy) is the one who would ultimately decide on the discipline or termination of an employee but, as the date of the hearing, there had been no disciplinary incidents. Murphy also testified that if someone was to be suspended or fired, he would make the final decision as to what action to take but would rely on Keala’s input because Keala “works with that team, guides that team on a daily basis, and knows best what to do for that business.” Murphy testified he would also seek Keala’s input on hiring decisions for the same reason, because Keala “knows what that business needs and he would be best positioned to provide valuable input.” However, the record contains no evidence regarding any hiring recommendations or decision-making involving Keala.

The record reflects that Keala spends 50-60% of his work time performing the same or similar duties as those of other employees but about 30% of such time involves quality control.

Murphy testified that he was unsure whether Keala was the most senior employee at the Kalaeloa Harbor facility. Keala is paid a salary while the other workers are hourly paid. Keala makes approximately 30% more than the next highest paid employee. Bonuses are paid on a percentage of compensation and Keala is thus eligible for a higher bonus than his co-workers. According to Murphy, he told Keala a year prior to the

hearing that he had decided to keep Keala on salary because he considered Keala to be the supervisor and Keala had agreed. Keala is not eligible to earn overtime.

Keala's job includes regularly communicating with Murphy by e-mail, by phone and in person when Murphy visits the Kalaeloa Harbor facility in order to keep Murphy informed about what is going on at the facility. Keala also works with Hawaii Cement to arrange for the loading of cement onto the barges. However, Keala is not the person who signs the contract with Hawaii Cement. Keala also communicates regularly with the Employer's vendors and is authorized to sign purchase orders for equipment. In the past year, he issued purchase orders for approximately \$350,000. Murphy testified that Keala and he communicate about the purchases being made and that Keala talks to Murphy if he needs advice on a purchase. Murphy testified that he trusts Keala's judgment and expects him to exercise "substantial discretion in purchases." The record contains no documentation regarding specific purchases made by Keala or what process was followed in placing these orders. Keala also maintains records pertaining to the Employer's operation, including copies of purchase orders and operational logs.

Keala also communicates with the local shipping agent and with the stevedores who operate the coal ship unloader.

The Employer prepares written annual evaluations on Kalaeloa Harbor employees. Keala provides Murphy with input for these evaluations but Murphy is the one who signs them. Murphy testified that he gets Keala's input because no one knows better than Keala what an employee's performance has been. However, the record does not contain any employee evaluations and does it disclose whether any input by Keala

amounted to an effective recommendation regarding any reward, discipline, or other personnel action taken as a result of an employee's evaluation.

Keala arrives early to work. He reads e-mails from Murphy and reports to Murphy about the operations at the facility and he reviews the work for the day to determine if any special coordination or scheduling matters need to be arranged. He also conducts safety meetings on an as needed basis with employees.

Analysis. The Employer contends that Keala should be excluded from the unit as a statutory supervisor and the Petitioner takes a contrary position.

The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act.

International Center for Integrative Studies, 297 NLRB 601 (1990); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). In determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee

rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). A determination of supervisory status must be based on actual authority and secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an employee is a statutory supervisor. *Laborers Local 341 v. NLRB*, *supra*; *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971); *Waterbed World*, 286 NLRB 425, 426 (1987). Only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), *enfd.* in relevant part 794 F.2d 527 (9th Cir. 1986). Therefore, an individual who exercises some "supervisory authority" only in a routine, clerical, or perfunctory manner will not be found to be a supervisor. *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). Further, the burden of proving that an individual is a supervisor is on the party alleging such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001); *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

Upon a careful consideration of all the evidence in the record, I do not find that the Employer has carried its burden to establish that Keala is a statutory supervisor who must be excluded from the unit. Thus, Keala spends 50 to 60% of his work time performing the same or similar functions as other employees or quality control type functions. The work site is located within two miles and five minutes from AES Hawaii's main facility where Murphy's office is located. Typically, Keala communicates

with Murphy everyday by e-mail and phone and Murphy visits the site once or twice a week and even more often when ships are loading or unloading. Murphy is the one who makes final hiring and disciplinary decisions and who signs employee evaluations. There is no evidence in the record that Keala's input on such matters has ever constituted an effective recommendation of any personnel action. Murphy was unaware of any personnel matters involving other employees at the site and could not testify what role, if any, Keala may have played in such matters. Although Murphy testified that Keala handles the scheduling of the employees at the Kalaeloa Harbor facility, the evidence establishes that the regular schedule has been in existence since before the Employer acquired the operation. Moreover, the record contains no evidence to show how scheduling decisions are actually made and whether there is any discretion involved in such decision-making. The fact that Keala keeps Murphy apprised of what is going on at the site and will bring personnel matters to his attention is not sufficient to make Keala a statutory supervisor. Nor does Keala's ability to sign purchase orders for the Employer show that he is a statutory supervisor in the absence of concrete evidence showing that such an action involves the exercise of independent judgment on his part. Thus, the record contains no examples of such purchase orders and the circumstances giving rise to Keala signing them. In this regard, the Board has found that individuals who make purchases on behalf of an employer but who possess no other supervisory authority are not managers or supervisors in the absence of evidence that they "exercise sufficient independent discretion in their jobs to truly align them with management." See *The*

Washington Post Company, 254 NLRB 168, 189-190 (1981); *Bell Aerospace, a Division of Textron, Inc.*, 219 NLRB 384 (1975).

In reaching the conclusion that Keala is not a statutory supervisor, I have also considered that Keala has a title (i.e., superintendent) and is paid more than his fellow employees. Thus, he plainly performs certain administrative functions which are not performed by other employees and which require him to report to work earlier than other employees. In addition, he also appears to be one of the more senior, if not most senior, employee at the facility. However, it is well settled that in the absence of the possession of statutory supervisory authority, the presence of secondary indicia such as higher pay or title are not sufficient to support a finding of statutory supervisory status.

I have also carefully considered the cases relied upon by the Employer in arguing that Keala is a statutory supervisor, but I do not find them controlling. Most of the cases cited contain evidence in the form of direct testimony by the individual whose supervisory status was in dispute, and/or contain concrete examples to demonstrate the possession of statutory supervisory authority, and/or include evidence that no supervisor or manager visited the jobsite for substantial periods of time. Thus, in *IBEW Local 901 (Ernest P. Breaux Electrical Co., Inc.)* 220 NLRB 1236 (1975), the jobsite foremen whose supervisory status was at issue testified directly that they directed the employees on their crew and assigned work to them. In addition, the record in that case showed that no higher level supervisor or manager visited their work site during the day as does Murphy. Further, the record in that case contained testimony about specific examples of incidents showing that the individuals at issue had authority to make effective

recommendations (i.e., the incident involving the Hebert brothers, whom one of the foremen recommended be transferred and who were thereupon transferred. *Id. at* 1237). Similarly, in *Custom Bronze & Aluminum Corp.*, 197 NLRB 397, 398 (1972), the foreman whose supervisory status was at issue testified directly that he scheduled, assigned, and directed the work in the shop; effectively recommended overtime; and that no other supervisors or managers were in the shop. Also, in *Stewart Oil Co.*, 100 NLRB 4, 5 (1952), the pumper whose supervisory status was at issue worked at an oil field with no other management/supervisory personnel nearby and he effectively recommended the hire of helpers. Finally, in *San Manuel Copper Corp.*, 118 NLRB 734, 735 (1957), the three train bosses whose supervisory status was disputed testified at the hearing and two of them testified that they could on their own authority, direct their crew, send a crewman home if he appeared for work in an unfit condition, and adjust minor grievances of their crewmen. Further, they directly testified that their permission was required before a crewman could be transferred to or from their shifts or be given time off and that they believed their recommendation for or against disciplinary action or for promotion for a crewman would be followed by the foreman.

Unlike *IBEW Local 901 (Ernest P. Breaux Electrical Co., Inc.)*, *Custom Bronze & Aluminum Corp.*, and *Manuel Copper Corp.*, the record in the instant case contains no testimony from Keala, the individual whose supervisory status is at issue, and no concrete examples to demonstrate that he possesses or exercises statutory supervisory authority. Moreover, unlike the cases cited above, the evidence in the instant case establishes that Employer Manager and Vice-President Murphy visits the Kalaeloa

Harbor facility on a weekly basis and is in daily contact with Keala by e-mail and telephone.

In view of the foregoing, I find that Keala is not a statutory supervisor and he will be included in the following unit, which I find to be an appropriate unit for collective bargaining purposes:

All full-time and regular part-time employees employed by the Employer at its Kalaheo Harbor, Hawaii facility; excluding all other employees, finance and accounting employees, confidential employees, office clerical employees, professional employees, administrative assistants to the plant manager, guards and/or watchpersons, managerial employees, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. In this regard, Section 103.20(c) of the Board's Rules and Regulations, as interpreted by the Board, requires employers to notify the Regional Director at least five full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Failure to do so *estops* employers from filing objections based on nonposting of the election notice. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as

such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1260, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list containing the **full names and addresses** of all eligible voters which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); and *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the names and addresses of all the eligible voters shall be filed by the Employer with undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Subregion 37 Office, 300 Ala Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu,

Hawaii 96850, on or before August 11, 2005.. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570.

This request must be received by the Board in Washington by August 18, 2005.³

DATED at San Francisco, California, this 4th day of August 2005.

/s/ Joseph P. Norelli

Joseph P. Norelli, Acting Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735

³ In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.